United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7119

To be argued by
A. SETH GREENWALD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

JACK SOBEL, as the sole surviving General Partner of Great River Country Club Associates,

Plaintiff-Appellant,

-against-

HONORABLE DAVID L. GLICKMAN, a Justice of the Supreme Court of the State of New York, Tenth District,

Defendant-Appellee.

----------X

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

BRIEF FOR APPELLEE

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Docket No. 76-7119

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BRIEF FOR APPELLEE

Questions Presented

1. Was the District Court required to assume jurisdiction and interfere with a pending state court action?

(a) Did federalism, comity and equity bar this action?

2. Did res judicata bar this action?

Statement of the Case

Appellant is a litigant in state court in an action in the Supreme Court, Suffolk County. His attorney sought to have appellee, a Justice of the Supreme Court, Suffolk County

disqualify himself in the action, Jack Sobel, etc. v. John Bess, an accounting etc.. This was denied. Appellant then brought an Article 78 proceeding in the Appellate Division, Second Department, Sobel v. Glickman, seeking to restrain appellee from hearing and determining the accounting in Sobel v. Bess. The grounds presented were "bias" and "prejudice" (Pet. ¶"20") as well as deprivation of due process (Pet. ¶24). Also claimed was violation of § 33.3(c) of the Rules of the Administrative Board of the Judicial Conference of the State of New York (7 N.Y.C.R.R. 33.3[c]) which have to do with disqualification of a judge.

The Appellate Division dismissed, January 16, 1976. This was "on the merits". It was held that "(a)n article 78 proceeding does not lie to remove a judge from hearing a case on the grounds presented". A stay of the Suffolk County trial was denied by the Court of Appeals. A notice of appeal to that court was filed and served.

Then appellant commenced the instant action in federal court (Eastern District of New York) against the appellee. The parties were exactly the same as in the state Article 78 proceeding. On appellant's motion for a temporary restraining order of the state court trial, Judge Weinstein denied the

application and dismissed the action on his own motion, citing Mitchum v. Foster, 407 U.S. 225, 243-244 (1972). This was on March 5, 1976. Since then the trial of Sobel v. Bess has been concluded and is awaiting decision by appellee.

POINT I

THE DISTRICT COURT PROPERLY DISMISS ON THE BASIS OF FEDERALISM, COMITY AND EQUITY

There should be no doubt that it would have been a flagrant breach of federalism, comity and equity for a federal district court to interfere with a pending state court action where no special circumstances were shown. The appellee has simply, at all times and at any cost, sought to avoid trial before appellee Justice. Mitchum v. Foster, 407 U.S. 225, 243-244 (1972)(Burger, C.J. conc.) should apply. The principles against interference with state court proceedings is "fundamental" in criminal proceedings, Mitchum, at 230, citing Younger v. Harris, 401 U.S. 37 (1972), but it is strong also as to any state court proceeding. Appellant failed to bring himself within any "special circumstances".

The federal statutes, 28 U.S.C. §§ 144, 455 on disqualifications of a judge obviously apply only to the federal courts and judges. Yet New York applies the same

standards in 7 N.Y.C.R.R. 33.3(c). Certainly a federal court does not apply "federal standards" which are statutory and not constitutional to a state court proceeding. Disqualification for bias and prejudice in a state court proceeding is a state law question. It has already been determined against appellant, but can be on issue on appeal in the state court.

The refusal to grant Article 78 relief in state court is mirrored in the fact that if the appellee were a federal judge, this Court would not entertain an appeal from a refusal to disqualify. It simply is not a final order. 28 U.S.C. § 1291. This appellant seeks to have a federal appeals court review a decision of a state court judge which would not be appealable herein even if made by a federal judge. The remedy in both situations is by appeal after a final judgment. This brings up all issues, including refusal to disqualify.

The appellant relies heavily on Mitchell v. Sirica, 502 F. 2d 375 (D.C. Cir. 1974) cert. den., _____U.S._____, 94 S. Ct. 3232 (1974), and quotes Circuit Judge McKinnon at length (382). App. Brief, Point II, pp. 19-20. What appellant fails to note is that Judge McKinnon dissented.

On the petition for a writ of mandamus or prohibition, the Circuit therein, denied the petition without opinion (id. at 376) in similar manner to the Appellate Division in Article 78, Sobel v. Glickman, supra.

If simply filing a complaint by a litigant against a judge with an official body required the judge to disqualify himself in any subsequent matter, "judge-shopping" would be facilitated. Appellant cites no precedent in federal law for this proposition (App. Br. pp. 22-23).

POINT II

THE ACTION WAS BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL

There is no doubt that appellant brought an action in state court via Article 78, against the same person, appellee Justice and on same claim -- i.e., that Justice Glickman disqualify himself or be disqualified for bias and prejudice. The decision in state court was "on the merits" and final. This should invoke the doctrine of res judicata, 1B Moore's, Federal Practice, 0.405[1], 0.409[1]. The appellant raised "due process in the state court, cf. Britt v. North Carolina, 404 U.S. 226.

Res judicata "constitutes an absolute bar to a subsequent action". Cromwell v. County of Sac, 94 U.S. 351 (1877) and covers every claim as to the matter in controversy. See 1B Moore's, 0.410[1]. If a "different" cause of action, collateral estoppel applies.

Tang v. Appellate Division, 487 F. 2d 138 (2d Cir. 1974) cert. den. 416 U.S. 906 is dispositive. The issues are the same in state and federal court. Appellant even went so far as to annex papers to the motion for a temporary restraining order which were intended for the state Court of Appeals. Therein appellant's attorney stated "the requirement of an impartial trial in our judicial system raises the question of due process under the constitutions of both this State, as well as of the United States" (pp. 2-3 of Aff. to [N.Y.] Court of Appeals). The appellant filed a notice of appeal to the N.Y. Court of Appeals on constitutional grounds (New York and United States) on February 6, 1976. This is still pending. See also affidavit of Jacob Oliner to App. Div., sworn to February 6, 1976, on motion for stay. Cf. Tang, supra, 487 F. 2d at 141, n. 3. There is no doubt appellant raised the same constitutional issues in state court and Tang, is authoritative that the action is barred by res judicata. See too: Lombardi v. Board of Election 520 F.2d 631, 636-7 (2d Cir. 1974) cert. den. 95 S. Ct. 1400; Taylor v. New York City Transit Authority, 433 F. 2d 665 (2d Cir. 1970).

CONCLUSION

THE ORDER BELOW SHOULD
BE AFFIRMED

Dated: New York, New York
May 20, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
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A. SETH GREENWALD
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of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Ghislaine Salomon, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendant-Appellee herein. On the 21st day of May, 1976, she served the annexed upon the following named person:

JACOB OLINER
60 East 42nd Street
New York, New York 10017

Attorney in the within entitled Action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Ghislaine Salomon

Sworn to before me this
21st day of May, 1976

A. Seth Greenwald

Assistant Attorney General
of the State of New York